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cc: order, docket, remand letter to
Los Angeles Superior Court, No. BC484387

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEONARD M. ROSS; LEONARD M.)	Case No. CV 12-07048 DDP (FFMx)
ROSS, et al.,)	
)	ORDER GRANTING MOTION TO REMAND
Plaintiffs,)	
)	[Dkt. No. 44]
v.)	
)	
ROBERT M. YASPAN, LAW)	
OFFICES OF ROBERT M. YASPAN,)	
)	
Defendants.)	
_____)	

Presently before the court is Plaintiff Leonard Ross's Motion to Remand Action to State Court. Having considered the parties' submissions and heard oral argument, the court adopts the following order.

I. BACKGROUND

On September 15, 2010, Plaintiff Ross retained Defendants as his counsel for Chapter 11 proceedings in bankruptcy court. (FAC ¶ 12.) On May 10, 2011, a Chapter 11 Trustee ("Trustee") was appointed by order of the bankruptcy court to manage Ross's estate after Defendants were terminated as attorneys. (See Plaintiff's RJN ("RJN"), Exh. 2, Bkr Doc. No. 331.)

1 On March 19, 2012, seeking a court order, the Trustee filed a
2 motion to abandon the Malpractice Claims and Action to Plaintiff
3 under 11 U.S.C. § 554, after determining that the cost and time to
4 pursue them would not result in a worthwhile recovery for the
5 estate. (RJN, Exh. 3, Bkr Dkt. Nos. 492-493.) Defendants opposed
6 abandonment. (RJN, Exh. 4, Bkr Dkt. No. 530, Defendants' Opp.)

7 On May 9, 2012, Plaintiff commenced this Action against
8 Defendants in the Los Angeles Superior Court and later filed the
9 First Amended Complaint on July 9, 2012. (See RJN, Exh. 8,
10 Conformed copy of Action; see also this court's Dkt. No. 1; RJN,
11 Exh. 9, State Court Docket.) On May 10, 2012, the bankruptcy
12 court ordered that the Malpractice Claims be formally abandoned to
13 the Plaintiff and indicated that the Plaintiff was free to pursue
14 his claims outside the bankruptcy court's jurisdiction. (See RJN,
15 Exh. 7.)

16 On August 23, 2012, Plaintiff's Chapter 11 plan of
17 reorganization (the "Plan") was approved and on September 12, 2012,
18 the Confirmation Order approved the Plan, thereby vesting all
19 property in Plaintiff so that he "may operate his business and use,
20 acquire and dispose of property without supervision by the
21 Bankruptcy Court free of any restrictions of the Bankruptcy Code or
22 Bankruptcy Rules." (RJN, Exh. 10, Bkr Dkt. No. 680, p. 17 ¶ 5.)
23 On March 7, 2013, the bankruptcy court granted Plaintiff's motion
24 for a Final Decree and closed the bankruptcy case. (RJN, Exh. 16,
25 Bkr Dkt. No. 835.)

26 On August 15, 2012, Defendants filed a Notice of Removal,
27 citing Federal Question Jurisdiction/Bankruptcy Jurisdiction and
28 Diversity Jurisdiction. (RJN, Exh. 12; Dkt. No. 1.) However, all

1 parties are California domiciliaries, so complete diversity does
2 not exist.

3 In this Motion, Plaintiff argues that the action should be
4 remanded because the court lacks jurisdiction or, in the
5 alternative, because the court should abstain from exercising
6 jurisdiction.

7 **II. LEGAL STANDARD & DISCUSSION**

8 **A. Jurisdiction**

9 28 U.S.C. § 1334(b) provides that "the district courts shall
10 have original but not exclusive jurisdiction of all civil
11 proceedings arising under title 11, or arising in or related to
12 cases under title 11." "Congress used the phrase 'arising under
13 title 11' to describe those proceedings that involve a cause of
14 action created or determined by a statutory provision of title 11."
15 In re Harris, 590 F.3d 730, 737 (9th Cir. 2009)(internal citation
16 omitted). Here, Plaintiff has brought claims for negligence
17 (professional legal malpractice), breach of fiduciary duty,
18 intentional misrepresentation, negligent misrepresentation, and
19 breach of contract against Defendant. (Plaintiffs' RJN, Exh. 8.)
20 Defendant argues that there is federal question jurisdiction over
21 this action, which the court interprets as a claim that the action
22 "arises under" federal law, and, separately, that the case "arises
23 in" bankruptcy law.

24 **1. "Arising Under" Jurisdiction**

25 A case can arise under federal law either when "federal law
26 creates the cause of action asserted" or when state law provides
27 the cause of action but "the federal issue is (1) necessarily
28 raised, (2) actually disputed, (3) substantial, and (4) capable of

1 resolution in federal court without disrupting the federal-state
2 balance approved by Congress." Gunn v. Minton, 133 S.Ct. 1059,
3 1064-65 (2013), citing Grable & Sons Metal Products, Inc. v. Daure
4 Engineering & Mfg., 545 U.S. 308, 314 (2005). The Supreme Court
5 recently held that "state legal malpractice claims based on
6 underlying patent matters will rarely, if ever, arise under federal
7 patent law for purposes of" 28 U.S.C. § 1338(a), the statute that
8 gives exclusive federal jurisdiction over patent matters to federal
9 courts. Gunn v. Minton, 133 S.Ct. at 1065. Although the legal
10 malpractice claim requires resolution of a federal patent question
11 insofar as the plaintiff "must show that he would have prevailed in
12 his federal patent infringement case if only petitioners had timely
13 made an experimental-use argument on his behalf," the federal issue
14 "is not substantial in the relevant sense" because the question
15 concerning patent law is hypothetical, and "[n]o matter how the
16 state courts resolve that hypothetical 'case within a case,' it
17 will not change the real-world result of the prior federal patent
18 litigation." Id. at 1065-67.

19 The court finds it appropriate to apply the same reasoning to
20 this case.¹ Although the legal malpractice case, brought under
21

22 ¹ Defendant analogizes this case to Air Measurement
23 Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504
24 F.3d 1262, 1273 (Fed. Cir. 2007), in which the Federal Circuit
25 found federal question jurisdiction in a state law malpractice
26 action. "Because proof of patent infringement is necessary to show
27 AMT would have prevailed in the prior litigation, patent
28 infringement is a 'necessary element' of AMT's malpractice claim
and therefore apparently presents a substantial question of patent
law conferring § 1338 jurisdiction." Id. at 1269. However, the
Supreme Court's holding in Gunn v. Minton directly contradicts this
holding. Thus, while the court considers the analogy between the
two contexts, it rejects Defendant's conclusion.

1 California law, will involve consideration of federal bankruptcy
2 law in determining whether the standard of care was met, the
3 resolution of the legal malpractice issue will not change the
4 outcome of the bankruptcy case, particularly since the trustee
5 abandoned the claim and the case is closed. Thus, the federal
6 issue "is not substantial in the relevant sense," id. at 1066,
7 Grable's requirements are not met, and the court does not have
8 federal question jurisdiction.

9 2. "Arising In" Jurisdiction

10 Defendant argues that the legal malpractice claims arise in
11 Title 11 and that this court therefore has jurisdiction. "A civil
12 proceeding 'arises in' a Title 11 case when it is not created or
13 determined by the bankruptcy code, but where it would have no
14 existence outside of a bankruptcy case. A state law contract claim
15 could exist independent of a bankruptcy case, but an action against
16 a bankruptcy trustee for the trustee's administration of the
17 bankruptcy estate could not." In re Harris, 590 F.3d at 737
18 (internal citation and quotation marks omitted). The Ninth Circuit
19 held that an action against a bankruptcy estate trustee for alleged
20 embezzlement and breach of fiduciary duties did "arise in" Title
21 11.

22 Because this case evokes the Bankruptcy Act's imposition
23 of duties on trustees to administer estate property and a
24 surety's liability on its bond for the benefit of the
25 estate, it cannot be gainsaid that it involves a core
26 issue. It is also particularly germane to the bankruptcy
proceeding context, for it involves the very bankruptcy
process itself. Nothing could be more important to the
handling of a bankruptcy estate than the fidelity of
those who are entrusted with its assets.

27 In re Ferrante, 51 F.3d 1473, 1476 (9th Cir. 1995) (internal
28 citations omitted).

1 At least one district court in this Circuit has held that this
2 reasoning applies not only to embezzling trustees but to bankruptcy
3 attorneys with legal malpractice claims against them. "The
4 fidelity of bankruptcy counsel cannot be any less important."
5 Meyer v. Young Conaway Stargatt & Taylor LLP, 2011 WL 1317282 *2
6 (March 31, 2011). Other Circuits have so found. See, e.g. Grausz
7 v. Englander, 321 F.3d 467, 471-72 (4th Cir. 2003)(internal
8 citations and quotation marks omitted)("'[A]rising in' jurisdiction
9 surely means that jurisdiction exists over a malpractice claim
10 against a lawyer for providing negligent advice to a debtor in a
11 bankruptcy case. . . . [T]he claim arises in the bankruptcy case,
12 regardless of whether it belongs to him or the estate. . . . This
13 malpractice claim wold have no practical existence but for the
14 bankruptcy case."); Baker v. Simpson, 613 F.3d 346, 349 (2d Cir.
15 2010)(internal quotation marks, citations, and alterations
16 omitted)(affirming district court holding that "the alleged
17 malpractice implicates the integrity of the entire bankruptcy
18 process and as such, appellants claims 'arise in' the Title 11
19 case."); and Capitol Hill Group v. Pillsbury, Winthrop, Shaw, 569
20 F.3d 485, 489 (D.C. Cir. 2009)("In sum, we agree with our sister
21 circuits that malpractice claims against court-appointed
22 professionals stemming from services provided in the bankruptcy
23 proceeding are inseparable from the bankruptcy context and
24 constitute a proceeding 'arising in' the bankruptcy. Such claims
25 therefore fall within the bankruptcy jurisdiction of the federal
26 courts.").

27 The court is not convinced that this legal malpractice
28 proceeding arises in Title 11 as understood in the Ninth Circuit.

1 In the first place, a legal malpractice claim is distinguishable
2 from a claim of embezzlement as in In re Ferrante, 51 F.3d 1473,
3 particularly when the malpractice claim was previously abandoned by
4 the Trustee in a now closed bankruptcy case. Additionally, the
5 court is skeptical that this legal malpractice claim "arises in"
6 Title 11 in the sense in which "arises in" is understood by the
7 Ninth Circuit, which associates it with the administration of the
8 bankruptcy estate.

9 The meaning of "arising in" proceedings is less
10 clear [than the meaning of "arising under"], but
11 seems to be a reference to those "administrative"
12 matters that arise only in bankruptcy cases. In
13 other words, "arising in" proceedings are those that
14 are not based on any right expressly created by
15 title 11, but nevertheless, would have no existence
16 outside of the bankruptcy. . . . If the proceeding
17 does not invoke a substantive right created by the
18 federal bankruptcy law and is one that could exist
19 outside of bankruptcy it is not a core proceeding;
20 it may be related to the bankruptcy because of its
21 potential effect, but ... it is an 'otherwise
22 related' or non-core proceeding.

23 In re Eastport Associates, 935 F.2d 1071, 1076 (9th Cir.
24 1991)(internal quotation marks and citations omitted). While the
25 legal malpractice claim would not exist without the bankruptcy case
26 insofar as the malpractice claim concerns the attorney's handling
27 of the bankruptcy case, the malpractice claim is a pure state law
28 claim; it is not an "administrative" matter peculiar to the
bankruptcy context involving, for instance, a court-appointed
trustee. The attorney-client relationship is governed by the same
state-law rules of professional conduct whether the action is a
bankruptcy action or a family law proceeding; there are no special
rules governing the relationship in a bankruptcy proceeding. Thus

1 it is not clear to the court that the action in any sense "arises
2 in" Title 11.

3 Assuming for the sake of argument that the legal malpractice
4 case does arise in Title 11, the court nonetheless finds it
5 appropriate to abstain from hearing it. Under 28 U.S.C. §
6 1334(c)(1), the district court, "in the interest of justice or in
7 the interest of comity with the State courts or respect for the
8 State law" may "abstain[] from hearing a particular proceeding
9 arising under title 11 or arising in or related to a case under
10 title 11." The following factors are considered in deciding
11 whether to abstain:

12 (1) the effect or lack thereof on the efficient
13 administration of the estate if a Court recommends
14 abstention, (2) the extent to which state law issues
15 predominate over bankruptcy issues, (3) the
16 difficulty or unsettled nature of the applicable
17 law, (4) the presence of a related proceeding
18 commenced in state court or other nonbankruptcy
19 court, (5) the jurisdictional basis, if any, other
20 than 28 U.S.C. § 1334, (6) the degree of relatedness
21 or remoteness of the proceeding to the main
22 bankruptcy case, (7) the substance rather than form
23 of an asserted "core" proceeding, (8) the
24 feasibility of severing state law claims from core
25 bankruptcy matters to allow judgments to be entered
26 in state court with enforcement left to the
27 bankruptcy court, (9) the burden of the bankruptcy
28 court's docket, (10) the likelihood that the
commencement of the proceeding in bankruptcy court
involves forum shopping by one of the parties, (11)
the existence of a right to a jury trial, and (12)
the presence in the proceeding of nondebtor parties.

23 In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir.
24 1990)(internal citation omitted).

25 Here, the court finds it appropriate to abstain for two
26 primary reasons. First, even if the malpractice claim is
27 considered to arise in the bankruptcy action, legal malpractice
28 claims are state law causes of action, and state courts are

1 familiar with adjudicating such actions. The state court
2 proceedings will be identical to the malpractice proceedings in any
3 other context: each side will present experts who testify to the
4 standard of care and whether it was breached.

5 Additionally, the court finds it appropriate to abstain
6 because the claim was formally abandoned to the debtor by the
7 estate and can therefore have no effect on the estate. Abandonment
8 "is the formal relinquishment of the property at issue from the
9 bankruptcy estate. Upon abandonment, the debtor's interest in the
10 property is restored nunc pro tunc as of the filing of the
11 bankruptcy petition." Catalano v. C.I.R., 279 F.3d 682, 685 (9th
12 Cir. 2002). "After notice and a hearing, the trustee may abandon
13 any property of the estate that is burdensome to the estate or that
14 is of inconsequential value and benefit to the estate." 11 U.S.C.
15 § 554. Even if the claim arises in the bankruptcy case, resolving
16 the claim can have no effect on the estate because the estate has
17 abandoned it. Thus there would be no gain in efficiency or
18 fairness in having the bankruptcy court decide the issue. In
19 addition to the claim being abandoned, the bankruptcy case is
20 closed and only the final distribution remains to be carried out,
21 making it even less efficient to have the bankruptcy court hear
22 this case.

23 **B. Attorneys' Fees**

24 In its discretion, a court may award attorneys' fees upon
25 remand of a removed action. 28 U.S.C. § 1447(c). "Absent unusual
26 circumstances, courts may award attorney's fees under § 1447(c)
27 only where the removing party lacked an objectively reasonable
28 basis for seeking removal. Conversely, when an objectively

1 reasonable basis exists, fees should be denied." Martin v.
2 Franklin Capital Corp., 546 U.S. 132, 141 (2005). See also Lussier
3 v. Dollar Tree Stores, Inc., 518 F.3d 1062 (9th Cir. 2008).

4 Although the court agrees with Plaintiffs that the case should be
5 remanded, the court finds that Defendants did not lack "an
6 objectively reasonable basis for seeking removal." The court finds
7 no other unusual circumstances that would justify awarding
8 attorneys' fees. The court therefore declines to award attorneys'
9 fees. Each side shall bear its own fees and costs.

10 **III. CONCLUSION**

11 For the reasons stated above, the court GRANTS the Motion.
12 The action is remanded to the state court. All pending motions are
13 vacated. Each side shall bear its own fees and costs.

14 IT IS SO ORDERED.

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16
17 Dated: July 9, 2013


DEAN D. PREGERSON
United States District Judge